SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 225

IN RE APPLICATION OF MORTON DAVID BLUESTONE FOR REGISTRATION AS A LAW STUDENT.

BRIEF.

Opinions in Courts Below.

The court decision sought to be reviewed was rendered in the Supreme Court of Pennsylvania on April 9, 1940. The case is unreported, but is indexed in the files of the above Court as No. 289, Misc. Docket #7, In re Application of Morton David Bluestone for registration as a law student. The court's decision is so brief it is quoted herewith:

> We have reviewed this record and are convinced that under the facts the applicant was properly denied the privilege of registering as a student of law. Petition dismissed. April 9, 1940. Per Curiam.

The decision affirmed those of the Allegheny County Board of Law Examiners and the Board of Law Examiners of the Commonwealth of Pennsylvania, refusing to register the above-named applicant as a law student in Allegheny County. Jurisdiction of the Supreme Court of the United

States to review the above decision upon certiorari to the Supreme Court of Pennsylvania is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, Sections 1 and 8a (43 Stat. 937, 940; United States Code, Annotated, Title 28, Sections 344, 350).

Grounds on Which Jurisdiction of the Supreme Court of the United States is Invoked.

The questions involved in the refusal of the above Boards of Law Examiners to register petitioner as a law student in Allegheny County, Pennsylvania, and presented to this Court in the attached petition for certiorari, disclose the grounds upon which the jurisdiction of this Court is invoked. They are as follows:

1. May a county or State board of law examiners, without violating the due process clause of the Fourteenth Amendment of the United States Constitution, refuse to register an otherwise-qualified applicant for the study of law for the reason that he has expressed a disbelief in the current adequacy of that Constitution as an instrument of government?

2. May such a board, without violating the aforesaid due process clause, refuse such registration on the ground that the applicant therefor is not capable of taking, conscientiously, in good faith, and without mental reservation, the lawyer's oath to support the Constitution, particularly when

(a) Such board has not challenged as a fact the applicant's previous taking of an oath to support the Constitution when he entered upon employment with the Federal Government; and when

(b) Such board has neither alleged nor shown that the applicant ever violated the oath to support the Constitution which said board has acknowledged he took.

3. May such a board, without violating aforesaid due process clause, refuse such registration for the reason that the applicant therefor was once a member of an organization of which, at the time of applicant's membership, a minority of members were Communists, particularly when it does not appear either

(a) That the organization was either Communist-controlled or engaged in illegal activities; or

(b) That the applicant himself was or is a Communist or ever engaged in any illegal activities, either as an individual or as a member of such organization.

4. Can such a board, under authority of a State Supreme Court decision, fail to disclose to an applicant its reasons for refusing him registration, without violating aforesaid due process clause?

Statement of Case Material to Questions Presented.

Petitioner, during an interview with a committee of the Allegheny County Board of Law Examiners delegated by the Board to act upon his application for registration as a law student, replied negatively to the question, "Do you believe in the [United States] Constitution?" The committee then asked petitioner whether he could conscientiously and without mental reservation take an oath to support the Constitution and petitioner replied that he could and that he had already done so upon entering the civil service of the United States Government (R. 1).

Petitioner's application was eventually referred to the Allegheny County Board of Law Examiners *en banc*, and petitioner was further questioned upon these points. He was asked how he could take such an oath conscientiously, in view of his stated opinion that the United States Constitution was currently an inadequate instrument of govern-

ment; and he replied that he could do so on the same basis as an elected legislator who had committed himself to a program requiring amendment of the Constitution by use of the amending procedure providing for therein. Petitioner was also questioned concerning his activities in "voluntary associations" while he was a student at the University of Pittsburgh, and whether any such organizations were Communistic in nature (R. 2). Petitioner answered these questions by disclosing that he had been a member of the American Student Union some years before, at a time when it was not controlled by any one political group and only a minority of its members were Communists.

When petitioner's application for registration as a law student was ultimately rejected by the Allegheny County Board, no reasons were disclosed to him for the rejection. The same was true when the State Board of Law Examiners affirmed the decision of the County Board, on petitioner's appeal. Petitioner made no request to either Board to disclose its reasons when he was notified of either decision; he regarded such request as futile and unnecessary in view of a decision of the Supreme Court of Pennsylvania, In re ——, 333 Pa. 593, stating that such boards were not required to divulge reasons for their decisions in such cases.

All contentions thus raised by petitioner were thereby left unanswered by both County and State Boards. When petitioner appealed to the Supreme Court of Pennsylvania, he contended:

(1) That the rejection of his application, if made on the ground of his non-"belief" in the adequacy of the United States Constitution, was invalid in the light of the Fourteenth Amendment to that Constitution.

(2) That any doubt the County Board may have had of petitioner's ability to take an oath to support the Constitution was unfounded in both fact and theory.

(3) That any possible connection between the County Board's rejection of petitioner's application and the Board's inquiries as to possible Communistic tendencies of organizations of which petitioner had been a member was irrelevant, because it was never shown that petitioner was himself a Communist or that the organizations were Communist-controlled, much less that either petitioner or said organizations ever engaged in any illegal activity.

(4) That petitioner had never been notified of any other reasons, if any, for his rejection, and had been given no opportunity to disprove their validity.

Errors Assigned.

The April 9, 1940, decision of the Supreme Court of Pensylvania, quoted in full on page 13 of this brief, dismissed petitioner's appeal without answering any of the contentions he presented. That Court's failure to pass upon the contentions presented is assigned as separate error as to each contention. Petitioner now urges these contentions, formulated as the questions presented this Court, and appearing on pages 14-15 of this brief, and presents the following argument in support of a negative answer to each of them.

ARGUMENT.

1. Petitioner's answers and stated opinion concerning the Constitution were in legal exercise of his freedom of speech; and the Board's refusal to register him for any reason connected therewith was an infringement upon such freedom so as to deny petitioner the due process of law required by the Fourteenth Amendment.

It cannot be questioned that petitioner was legally entitled to hold the views he expressed, for the right to entertain particular political beliefs has never been legally con-

tested in this country. The question in this regard, therefore, is whether there was anything legally objectionable in petitioner's exercise of his right of expression of such views. Petitioner submits that there obviously was not any such legal objection: he was answering questions asked him by a governmental agency, and doing so in an orderly and peaceful manner, and was not even attempting to persuade anyone in his presence to his political views. Petitioner's method of expression was, therefore, well within the bounds of legality according to the tests applied by this Court in a long line of cases, beginning with *Schenck* v. *United States,* 249 U. S. 47, and continuing to *Herndon* v. *Lowry,* 301 U. S. 242.

Petitioner's exercise of free speech having been lawful, it is well settled that the Fourteenth Amendment can be invoked to protect it. *Gitlow* v. *New York,* 268 U. S. 652 (666); *Grosjean* v. *American Press Co.,* 297 U. S. 233 (244); *DeJonge* v. *Oregon,* 299 U. S. 353 (364); *Herndon* v. *Lowry,* 301 U. S. 342 (259); *Palko* v. *Connecticut,* 302 U. S. 319 (324); *Lovell v. Griffin,* 303 U. S. 444; *Schneider* v. *State of New Jersey,* 308 U. S. 147; and *Cantwell* v. *State of Connecticut,* — U. S. —, 60 S. Ct. 900. While most of these cases involve either criminal legislation or prohibiting ordinances affecting the exercise of free speech, these are not the only methods of repressing free speech that are repugnant to the Fourteenth Amendment. In *Grosjean* v. *American Press Co.,* 297 U. S. 233, this Court held unconstitutional a State tax on newspaper circulation on the ground that it abridged the freedom of the press in a manner repugnant to the due process clause of the Fourteenth Amendment. The tax in question, imposed upon the gross receipts of newspapers having a circulation of more than 20,000 weekly, had as its object restriction of circulation of certain newspapers which were recognized as being opposed to the politi-

cal organization whose members were elected State officials. Petitioner contends that his case is analogous in essential respects to the *American Press Co.* case. The refusal of the Allegheny County Board of Law Examiners to register petitioner as a law student because he held or expressed particular political views, has the effect of abridging petitioner's freedom of speech. It would have been no answer to the newspapers in the *American Press Co.* case to have told them that their right of freedom of expression was still exercisable by them if they kept their circulation below 20,000 copies per week. Similarly, it would be no answer to petitioner to tell him that his freedom of speech is unimpaired, if he is to be excluded from the practice of law because he exercised it in a lawful manner. For an examining board to exclude an applicant from a profession because that board disapproves of or disagrees with the applicant's lawfully-held and lawfully-exercised political opinions must, petitioner contends, be repugnant to the due process of law clause of the Fourteenth Amendment.

2. The contention that petitioner is legally incapable of taking the lawyer's oath because of his views concerning the Constitution is not well founded, particularly in view of the acknowledged facts in the case.

The lawyer's oath in question is that provided for as follows by act of the Pennsylvania legislature, April 14, 1834, P. L. 333, sec. 69:

> Before any attorney, admitted as aforesaid, shall make any plea at the bar except in his own case, he shall take an oath or affirmation, as follows, viz.:
>
> You do swear or affirm that you will support the Constitution of the United States and the Constitution of this Commonwealth, and that you will behave yourself in the office of attorney, within this court to the

> best of your knowledge and ability, and with all good fidelity, as well to the court as to the client, that you will use no falsehood, nor delay any person's cause for lucre or malice.

No case in point has aver arisen involving this or similar oaths; but neither an inspection of the phrasing of the oath nor logical reasoning sustains a conclusion that belief in the current adequacy of the Constitution is a prerequisite to taking such an oath. On the contrary, both history and reason support an opposite conclusion; for members of Congress are required to take such an oath (i.e., to support the Constitution; Article VI, clause 3, of the Constitution itself) and yet they are specifically authorized by the Constitution itself to propose amendments to the Constitution; and Congress has done this on numerous occasions. Certainly a proposal to amend the Constitution is nothing less than a proposal to remedy an inadequacy in it; and no one would seriously suggest that, when the Congress of the United States proposes a constitutional amendment, the members thereof are violating their oaths. Were such a suggestion to be law the Constitution could never be changed and its Article VI would become meaningless; for persons elected to Congress and known to be intending to propose amendments to the Constitution would be automatically disqualified from taking the oath required of them and also from taking their seats.

The contention, put forward by members of the Allegheny County Board of Law Examiners, that petitioner is legally unqualified to take an oath to support the Constitution is rendered further groundless by the facts (a) that the Board has never challenged as a fact petitioner's statement in testimony that he had taken such an oath, and (b) that the Board has never contended that petitioner violated the oath he did take (R. 2, 5-6).

3. Any reasons for refusal to register petitioner because of his previous membership in organizations in which there were Communist members cannot be view as valid.

Although no case in exact point appears in the reports of this Court, a reasonably close analogy is found in *DeJonge* v. *Oregon,* 299 U. S. 353, in which a criminal syndicalism statute was held unconstitutional because it was so broad that anyone assisting in the conduct of a meeting, however peaceable and lawful its purpose, would be classed as a criminal if the meeting were held by an organization of the type outlawed by the statute. The principal in the *DeJonge* case was a Communist, assisted at such a meeting, and along with others was indicted under the statute. This Court held that his conviction could not stand on the facts shown because the statute was repugnant to the due process clause of the Fourteeenth Amendment.

This case, though on the civil side, presents facts in petitioner's favor stronger than were those for the appellant in the *DeJonge* case, for the Allegheny County Board of Law Examiners not only failed to show that petitioner ever participated in any illegal activities or assisted organizations of illegal purpose or activity, but failed also to show even that petitioner was a Communist, or that any of the organizations to which he belonged was Communist-controlled. Petitioner therefore contends that the Board's rejection of his application, if based on any of these suggested grounds, was repugnant to the due process of law clause of the Fourteenth Amendment if he has established in argument 1 any right protectable by this clause.

4. Any reliance by the County Board upon an alleged right to refuse to divulge reasons for its rejection of petitioner's application is necessarily repugnant to the due process clause of the Fourteenth Amendment.

No cases on this point have been before this Court; however, it is a well established principle that exercise of

administrative authority, whether quasi-judicial or not, must be reasonable and not arbitrary. To permit the principle expressed in 333 Pa. 593 to stand as law is to authorize county boards of law examiners to refuse registrations on any ground or on no ground at all and to effectively deny applicants for such registration any right of appeal if they are refused. It would be, in short, giving such boards plenary powers to exercise any arbitrary inclinations their members might possess; and such unchecked and arbitrary authority is utterly inconsistent with the concept of orderly and reasonable judicial procedure embodied in the due process clause of the Fourteenth Amendment.

Conclusion.

The judgment of the Supreme Court of Pennsylvania should be reversed and the petitioner's application for registration as a law student reinstated.

MORTON DAVID BLUESTONE,
Petitioner.